IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1016

WAYNE DARNELL BUMPER,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

PETITIONER'S BRIEF

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Opinion Below

The opinion of the Supreme Court of the State of North Carolina is reported at 270 N.C. 521, 155 S.E. 2d 173.

Jurisdiction

The judgment of the Supreme Court of North Carolina was made and entered on July 24, 1967, and a copy thereof is set out in the Appendix. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

Questions Presented

1. Whether it is a denial of the defendant's rights under the Fourteenth and Sixth Amendments to the Constitution of the United States in a state proceeding, when a state court denies a timely request by the defendant to disallow the prosecuting attorney's challenges of prospective jurors for cause on the ground that they are opposed to capital punishment, for the reason that allowing such challenges deprives the defendant of a jury trial by his peers, that is, by representatives of a fair cross-section of the community.

2. Whether it is a denial of the defendant's rights under the Fourteenth and Fourth Amendments to the Constitution of the United States in a state proceeding, for police officers to produce a piece of paper, which they claim to be a valid search warrant, to the head of the household in which the defendant resides, and thereby gain entry to the house and gain possession of a rifle, and for the state court to permit this rifle to be used in evidence against the defendant, based on the stipulation of the state's prosecuting officer that the state's theory is there was a voluntary consent and the state will not rely on the piece of paper the police officers represented to be a warrant.

Constitutional Provisions Involved

Constitution of the United States:

Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof,

are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Statement of the Case

The petitioner, Wayne Darnell Bumper, was indicted on a capital bill for rape and on two bills for assault with a deadly weapon with intent to kill, inflicting serious injuries, not resulting in death. The three bills of indictment were consolidated (App. 2-5, 12) for trial. The cases were tried in the Superior Court of Alamance County, North Carolina, on October 24-27, 1966.

The petitioner defendant presented a pretrial motion to the Court for the return of seized property and its suppression as evidence, consisting of several items of clothing and one .22 caliber Remington rifle. (App. 7-8) The Court allowed the motion insofar as it pertained to the articles of clothing, but the Court withheld a ruling on the motion with respect to the .22 caliber Remington rifle.

The defendant entered a plea of not guilty to each of the charges.

The Court proceeded with the selection of the jury. After the Solicitor made his first challenge for cause on the ground of opposition to capital punishment, the attorney for the defendant made a motion for the disallowance of challenges for cause grounded on opposition to capital punishment. This motion was treated as a continuing motion as to all such challenges and was denied. (App. 13-21) A total of fifty-three prospective jurors were examined before a jury of twelve and two alternates were selected. From among the prospective jurors, sixteen were excused by the Court upon challenges for cause by the State on the ground that the prospective jurors opposed capital punish-

ment. The defendant is a Negro male. The trial jury consisted entirely of white males. Of the eight white females who were examined, five were challenged and excused for cause as being opposed to capital punishment. Of the six Negro males examined, three were examined and excused for cause as opposed to capital punishment, two were peremptorily challenged by the Solicitor, and one was excused by the Court upon motion of the Solicitor because of a criminal record. (App. 72)

The principal witnesses for the state were Mrs. Loretta Nelson and Monty Jones, the alleged victims of the assaults for which the defendant was tried. They testified that on the evening of Sunday, July 31, 1966, they went for a ride in Mrs. Nelson's automobile, and, after it had become completely dark, they parked on a dirt road near a lake. (App. 23, 24) A man carrying a rifle came up to the car and forced the couple to get out. He asked them for their money, and they gave him what money they had, which was about $3.00. (App. 23-24, 35)

The man, a Negro, told Mrs. Nelson that he wanted to have sexual intercourse with a white girl. When the gun was pointed to her companion, Monty Jones, she consented to have intercourse. They testified that while the man was having intercourse with Mrs. Nelson he kept the gun in his hand, covering Monty Jones who was lying down in the back seat of the car. (App. 24, 35-36)

The witnesses stated that their attacker then got into the car with them and instructed Mrs. Nelson to drive to the highway and from there into another small dirt road some distance away. Here they got out of the car again. The man told the witnesses that he was going to have to

kill them because they would go to the police. Monty Jones told the attacker to tie them to trees with some belts and a dress which were in the car, blindfold them, and leave with the car. The attacker agreed to do this, and at his direction Mrs. Nelson tied Monty Jones to a tree. The attacker then tied Mrs. Nelson to another tree, removed her clothing and had intercourse with her again while she was tied to the tree. The attacker thereafter shot both Monty Jones and Mrs. Nelson in the chest and left with the car. The witnesses stated that they managed to free themselves, get to a farmhouse, and summon help. (App. 25-27, 36-38) At the time of the trial, both had recovered from their wounds. (App. 30, 38)

The witnesses Loretta Nelson and Monty Jones both testified that it was the defendant Wayne Darnell Bumper who had attacked them. They stated that although it was dark at all times while he was with them, the moon provided enough light for them to recognize him. (App. 29-30, 39-40)

The name of the petitioner Wayne Darnell Bumper was released on and after August 3, 1966, by the Sheriff's Department as the person arrested and charged with the attacks on Loretta Nelson and Monty Jones, and this information was printed in newspapers in Graham and Burlington, North Carolina, and elsewhere. (R. 10-15, App. 62) Several days later Monty Jones and Loretta Nelson were brought to the Alamance County jail and invited to look at a lineup. The lineup consisted of ten Negro males and included the defendant Wayne Darnell Bumper. First Monty Jones and Loretta Nelson were conducted through the lineup separately. Both identified the person carrying

card number 6 as their attacker. The defendant was carrying card number 7. (App. 33, 41, 58). Mrs. Nelson and Monty Jones were then conducted through the lineup together. All persons in the lineup, including the defendant, were required to state their names. The defendant was carrying card number 2. Both witnesses identified the man who was carrying card number 2 as the attacker. (App. 33, 41, 58-59)

The state sought to introduce into evidence a .22 caliber rifle taken by the sheriff's deputies and a State Bureau of Investigation officer from the home where the defendant resided with his grandmother, Mrs. Hattie Leath. In the absence of the jury, the Court heard testimony bearing on the defendant's motion to suppress this evidence. The Solicitor stated for the record that the state was not relying upon any search warrant, but was relying solely upon the voluntary consent to search and seizure by Mrs. Hattie Leath, the person in possession of the premises searched. (App. 43)

Mrs. Leath stated in her affidavit substantially as follows: She is a 66-year-old Negro widow. She lives at the end of a one-mile dirt road in Alamance County. She lives with her son and several infant grandchildren. The defendant is her grandson, and he lived with her before his arrest. On August 2, 1966, four white men whom she knew to be officers of the Sheriff's Department, drove up to her house. Her son was not in or near the house at the time. One of the deputies came upon the porch of the house and walked up to the front screen door. She was standing immediately inside the door. The deputy said that he had a notice or a warrant or something like that for searching the house. After hearing this, Mrs. Leath did not stop to

think whether the officers had the right to search the house. She simply answered the officers right away by saying, "Go ahead," as she opened the door and stepped out onto the porch. The officers began at once to search the house. (App. 7-8)

Mrs. Leath identified the Remington .22 caliber rifle which was taken from the house. On cross examination by the Solicitor, Mrs. Leath testified as follows:

> Four of them come in and I was busy about my work and they walked into the house and one of them walked up and said, "I have a search warrant to search your house," and I walked out and told them to come on in. . . .
>
> Q. What do you say that he said to you?
>
> A. Well, he just come on in and said he had a warrant to search the house, and he didn't read it to me or nothing, and so I just told him to come on in and go ahead.
>
> Q. Go ahead and search?
>
> A. Yes, I did, and I went on about my work. I wasn't concerned what he was about. I was just satisfied.
>
> Q. He told you he had a search warrant?
>
> A. He just told me he had one, but he didn't read it to me. . . .
>
> Q. You had no objection to them making a search of your house, did you?
>
> A. No, I didn't. . . .
>
> Q. So you let them search and it was all your own free will?
>
> A. Yes, sir. . . .

[Mrs. Leath said that she told the Sheriff to look all over the house, that she was willing to let them look anywhere in the house. She said that she was not threatened with anything and not promised any money by the officers. On redirect examination Mrs. Leath testified:]

Q. You looked upon them as officers of the law and they had a right to go around and go into people's homes, is that what you thought?

A. He said he was the law and had a search warrant to search the house, why I thought he could go ahead.

Q. You believed he had a search warrant?

A. That is what I believed about it. I took him at his word.

Q. You thought the search would be valid and there would be no reason to look at it, is that right?

A. That is right. That is what I thought about it. . . .

Q. At this time you knew that your grandson had been charged with the crime?

A. No, I didn't.

Q. You didn't?

A. No, nobody told me anything, they didn't tell me anything, just picked it up like that, they didn't tell me anything about my grandson. (App. 46-48, restored to question and answer form)

The court overruled the defendant's motion to suppress the evidence, finding from the clear and convincing evidence, that Mrs. Hattie Leath voluntarily consented to the search of her premises. (App. 48)

An agent for the State Bureau of Investigation testified for the state as an expert witness in the field of firearms identification and ballistics. He stated that the .22 caliber Remington rifle, which had been seized from the home where the defendant resided, was, in his opinion, the gun which fired two .22 caliber cartridge cases found at the place where Loretta Nelson and Monty Jones had been tied up, and which fired a .22 caliber spent bullet which was taken from the body of Monty Jones. (App. 63-64)

The Sheriff testified that some unidentified fingerprints were found in Mrs. Nelson's car, but that the defendant's fingerprints were not found there. (App. 69-70)

The defendant did not offer any evidence.

Following the charge by the Court, the jury deliberated and returned with a verdict of guilty as charged in the assault cases and guilty as charged with recommendation of life imprisonment in the rape case. The Court sentenced the defendant to two consecutive 10-year terms of imprisonment for the assault convictions, and a sentence of life imprisonment for rape, to commence at the expiration of the second 10-year sentence. (App. 10-12)

The petitioner defendant appealed the conviction to the Supreme Court of North Carolina. There the defendant introduced an affidavit of Dr. Faye Goldberg, of Decatur, Georgia, a professor of psychology at Morehouse College, in support of his argument that his trial was rendered unfair by the Court's permitting the Solicitor to challenge for cause all the prospective jurors who were opposed to capital punishment. Dr. Goldberg's affidavit reported the results of a study which she had made on the relationship between the willingness of a prospective juror to vote for

the death penalty and the predisposition of such a juror to convict rather than acquit. She stated that among the results of her study was the finding that people who say they do not have conscientious scruples against the use of the death penalty are more likely to convict than acquit. (App. 73-77) In her affidavit Dr. Goldberg also described some similar research conducted by Dr. Cody Wilson, a teacher of social psychology at the University of Texas, with which she had become familiar in the course of her own work. Dr. Cody Wilson found that people who believe in capital punishment are more likely to judge guilty than are people who do not believe in capital punishment, and people who believe in capital punishment are more likely to be biased in favor of the prosecution and against the defendant. (App. 74, 78-80)

The Supreme Court of North Carolina filed its opinion affirming the conviction of the petitioner defendant. The Court held, with respect to the questions which are raised by this proceeding on writ of certiorari, that (1) it was not error for the Court to excuse prospective jurors on the ground that such persons did not believe in capital punishment, and (2) a rifle which was seized in the house where the defendant lived was taken with the voluntary consent of Mrs. Hattie Leath, and therefore its admission as evidence was not error. (App. 81-93)

The petitioner petitioned the Supreme Court of the United States for a writ of certiorari to review the judgment of the Supreme Court of North Carolina. The petition was granted. (App. 94)

SUMMARY OF THE ARGUMENT

I.

THE STATE OF NORTH CAROLINA DENIED THE PETITIONER EQUAL PROTECTION OF THE LAWS AND DUE PROCESS OF LAW AND THE RIGHT OF TRIAL BY IMPARTIAL JURY WHEN PROSPECTIVE JURORS WERE EXCUSED AT HIS TRIAL FOR CONSCIENTIOUS SCRUPLES AGAINST CAPITAL PUNISHMENT.

A. Juries Must Be Composed of a Representative Cross-Section of the Community.

The petitioner was tried and found guilty by a jury from whose ranks had been removed all those who had conscientious scruples against the death penalty. The jury is the collective conscience of the community; the role of the jury is central to the democratic process. The courts have consistently stricken down jury service exclusions based on race, religion, sex, and economic class. There is a constitutional right to a jury drawn from a group which represents a cross-section of the community.

B. Death-Qualified Juries Are in Fact Conviction-Prone Juries.

In the present case, 30% of the prospective jurors were excused upon the state's challenge for cause on the ground of conscientious scruples against the death penalty. The experience of the criminal bar is that jurors who favor capital punishment, as compared to jurors who oppose capital punishment, are less likely to indulge in the presumption of innocence of the defendant, are more likely

to believe the state's evidence than that of the defendant, and are more likely to convict than acquit. This observation is supported by the theory of the authoritarian personality. Persons who favor capital punishment would appear to be politically rightist authoritarians, who are conservative, and at the same time moralistic, highly punitive, and distrustful. Psychological studies bear out this hypothesis. Compared with jurors who have conscientious scruples against the death penalty, jurors without death scruples have been demonstrated to be generally more conservative, and particularly more likely to render a verdict of conviction, and more likely to be biased in favor of the prosecution and against the defendant. A national poll shows more Americans against the death penalty than in favor of it; necessarily a large percentage of the persons who register opposition to the death penalty would be excused for cause from a capital jury. Consequently, the practice of allowing challenges of jurors for cause in capital cases limits jury duty to an element of the community which is predisposed to convict and prosecution-oriented, eliminates from the jury a large segment of the population that would be more favorable to the defendant on the issue of guilt or innocence, and effectively deprives the defendant of trial by a jury composed of a cross-section of the community.

C. Exclusion of Jurors With Death Scruples Has No Common Law Basis.

There seems to have been no common law challenge for cause of persons with conscientious scruples against the death penalty. The majority of American courts hold the state does have a right to such a challenge. In the past when the death penalty was mandatory for almost all

capital crimes, there was some justification for this position, because jurors who could not accept the death penalty would be compelled to vote for acquittal. At present this reasoning does not apply, because the jury is vested with the discretion to return a verdict of life imprisonment in a capital case.

D. The State Is Without Legitimate Interest in Demanding Death-Qualified Juries.

The only right the state can presently assert for challenging jurors with death scruples is the right of the state to seek the death penalty. This right is without foundation in practicality in the light of the decreasing number of executions, growing popular dissatisfaction with the death penalty, and increasing number of states which have abolished capital punishment. The experience in Iowa, where challenges for cause on the ground of conscientious scruples against the death penalty are not permitted, indicates that the lack of a challenge for cause of jurors with death scruples will not of itself bring an end to the death penalty. There is no evidence to show that an unusual number of hung juries would result from abolishing the challenge for cause of jurors with death scruples.

E. Removal of Death-Scrupled Jurors for Cause Is a Denial of Due Process, Equal Protection, and the Right to Trial by Impartial Jury.

Allowing the challenges for cause of jurors with scruples against the death penalty in this case denied the petitioner equal protection of the laws, in that exclusion from jury service of the class of persons with death scruples was a classification injurious to the petitioner, which was not

grounded upon any legitimate state interest. The practice of excusing for cause jurors with death scruples denied the petitioner due process of the law; because it infected the integrity of the fact-finding process. Exclusion of jurors with scruples against the death penalty also denied the petitioner a trial by an impartial jury, in violation of the Sixth and Fourteenth Amendments.

II.

THE PETITIONER'S RIGHTS UNDER THE FOURTEENTH AND FOURTH AMENDMENTS WERE VIOLATED BY THE STATE OF NORTH CAROLINA BY THE INTRODUCTION OF A RIFLE AT HIS TRIAL, ON THE GROUND THAT IT HAD BEEN TAKEN BY VOLUNTARY CONSENT FROM THE PETITIONER'S DWELLING, WHEN THE POLICE OFFICERS HAD GAINED ENTRY TO THE HOUSE BY PRODUCING A PIECE OF PAPER THEY CLAIMED TO BE A SEARCH WARRANT.

A. There Was No Voluntary Consent to the Search of the Petitioner's House.

In applying the search and seizure exclusionary rule, the states must be governed by the fundamental criteria of the Fourth Amendment. The growing use by the police of consensual searches instead of searches with search warrants represents an erosion of Fourth Amendment rights. When officers come without warrants and demand to search a home under government authority, these are circumstances of implied coercion, and articles taken from the home ordinarily must be suppressed on Fourth Amendment grounds. In the present case the search was made on the strength of a paper which the officers represented

to be a search warrant, and they were admitted to the house by petitioner's grandmother under the assumption that they possessed a valid search warrant and had a right to enter. There was no indication that the petitioner's grandmother would have admitted the officers had they come without a warrant. Yet the state abandoned the "warrant" at the time of the trial, and relied instead on the theory that the petitioner's grandmother voluntarily consented to the search. Under established Fourth Amendment tests, there was no voluntary consent to the search by the petitioner's grandmother in view of the circumstances of her age, sex, and race, the physical isolation of the house, the absence of other friendly adults, and the number of officers and the suddenness of their intrusion. In any event, if consent was secured, it was consent to a search with a warrant, not to a warrantless search. The Supreme Court of North Carolina was influenced to some extent in its decision by the unacceptable supposition that so long as inculpating evidence is found, the means of a search are justified by its end.

B. The State Failed to Secure an Intelligent Waiver of the Right to Be Free From Warrantless Searches.

For a consensual search to be effective, there must be an understanding and intentional waiver of the constitutional protection against unreasonable searches. It is established that the constitutional right to assistance of counsel and privilege against self-incrimination cannot be waived in the absence of proof that the subject was fully informed of his constitutional rights, and then freely and understandingly chose to relinquish them. The same principle should apply to waiver of Fourth Amendment rights. No such intelligent waiver was obtained in the present case.

C. The Petitioner Has Standing to Complain of the Search of His Premises.

The petitioner has standing to complain of the search of his premises, because, as a member of the household, he was legitimately connected with the premises where the search took place.

ARGUMENT

I.

The State of North Carolina Denied the Petitioner Equal Protection of the Laws and Due Process of Law and the Right of Trial by Impartial Jury When Prospective Jurors Were Excused at His Trial for Conscientious Scruples Against Capital Punishment.

A. Juries Must Be Composed of a Representative Cross-Section of the Community.

The petitioner was tried and found guilty by a jury from whose ranks had been removed all those who had conscientious scruples against the death penalty. The contention of the petitioner is that the challenge of jurors for cause on the ground that they have conscientious scruples against the death penalty deprives a defendant of an impartial jury, and assures the state of a jury whose predisposition is to convict.

The Magna Carta (Cap. XXIX) held that no man will be passed upon or condemned except "by lawful Judgment of his Peers." By the time the common law was imported to the American continent, this right had become the right of a trial by jury as we know it today. 4 Blackstone, *Commentaries* *349. The denial and abridgement of trial

by jury was one of the complaints which inspired the American Revolution.[1]

The Federal Constitution and the constitution of every state of the United States contains a guarantee of trial by jury in criminal cases.[2]

The jury is regarded as the collective conscience of the community. The deliberations and decision-making of a jury are the essence of the democratic process. By serving and being available to serve on juries, the citizens acquire a sense of personal responsibility for fair enforcement of just laws.

An understood and accepted function of the jury system is to blunt the force of laws that are harsh, outmoded, and arbitrary. At times in our history juries have effectively nullified unpopular laws, for example, the colonial taxation and trade regulation laws, and more recently the national prohibition laws. See Powell, *Jury Trial of Crimes,* 23 Wash. & Lee L. Rev. 1, 3, 6 (1966). Today we do not witness such widespread jury intransigence; this condition may be viewed as an indication of general public acceptability of present law.[3]

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[1] "As manifested by the Declaration of Independence, the denial of trial by jury and its subversion by various contrivances was one of the principal complaints against the English Crown. Trial by a jury of laymen and no less was regarded as the birthright of free men." *Green* v. *United States,* 356 U.S. 165, 209 (1958) (Black, J., *Dissenting*).

[2] *Irvin* v. *Dowd,* 366 U.S. 717, 721-22 (1961), citing Columbia University Legislative Drafting Research Fund, *Index Digest of State Constitutions* 578-589 (1959).

[3] "When in respect of any class of offenses the difficulty of obtaining convictions is at all general in England, we may hold it as an axiom, that the law requires amendment. Such conduct in juries is the silent protest of the people against its undue severity. '[I]t has

The notable exception in the criminal process of general acquiescence of juries in the present state of the law is the not infrequent practice of juries to convict of a lesser offense, especially in capital cases, as a protest against the severity of punishments.[4]

The Supreme Court and lower courts in a long line of cases have struck down various practices of tampering with the jury selection process which produces jury panels that are predisposed against the defendant. These cases stand for the principle that a defendant is entitled to trial by an impartial jury, a truly democratic body, composed of a representative cross-section of the population.

> The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status as that which he holds.—*Strauder* v. *West Virginia,* 100 U.S. 303, 308 (1880).

> But they [the officials charged with choosing jurors] must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community. Tendencies, no matter how slight, toward the selection of the jurors by any method other than a process which will insure a trial by a representative group are under-

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the important and useful consequence, that laws totally repugnant to the feelings of the community for which they are made, cannot long prevail in England.'" Forsyth, *History of Trial by Jury* 431 (1852), citing Lord John Russell, *Essay on English Government* 393.

[4] Comment, *Compromise Verdicts in Criminal Cases,* 37 Neb. L. Rev. 802, 808-811 (1958); Comment, *Jury Discretion Over Death Penalty,* 12 N.Y. L. Forum 688, 691 (1966).

> mining processes weakening the institution of jury trial, and should be sturdily resisted. *Glasser* v. *United States,* 315 U.S. 60, 86 (1942).

Manipulation of the jury system by disabling some class of the population from jury service causes injury "not limited to the defendant—there is an injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Ballard* v. *United States,* 329 U.S. 187, 195 (1946).

This concept was first applied to hold that a Negro criminal defendant is denied equal protection of the laws in violation of the Fourteenth Amendment, if he is required to submit to trial by a jury drawn from a panel from which the state has purposely excluded persons of the Negro race. *Strauder* v. *West Virginia, supra; Norris* v. *Alabama,* 294 U.S. 587 (1935). Similarly it is unconstitutional to try a Mexican American by a jury from which persons of Mexican descent have been deliberately excluded. *Hernandez* v. *Texas,* 347 U.S. 475 (1954). A recent Federal District Court case logically extends this authority to hold unconstitutional the exclusion of women from jury duty. *White* v. *Crook,* 251 F. Supp. 401 (D.C. Ala. 1966). See dictum to the same effect regarding the exclusion of women from juries in *Ballard* v. *United States,* 329 U.S. 187 (1946). The exclusion of members of the defendant's political party from jury duty was determined to be prejudicial in *Kentucky* v. *Powers,* 139 Fed. 452 (C.C. Ky. 1905). Recently the Supreme Court of Maryland reversed the conviction of a Buddhist on the ground that he was denied equal protection by the state requirement that members of

juries demonstrate a belief in God. *Schowgurow* v. *State*, 240 Md. 121, 213 A.2d 475 (1965).[5]

Beyond jury service restrictions based on race, religion and sex, there remain less obvious, but equally prejudicial, discriminations arising from economic and sociological classification. *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217 (1946), was a case of economic class discrimination. The clerk of court and jury commissioner had deliberately excluded from jury lists all persons who worked for a daily wage, on the theory that most of them would be excused for financial hardship to avoid losing work with compensation limited only to the low per diem jury fee. The Court reversed on statutory grounds, but stated the established requirement that juries be composed of a cross-section of the community and said wage earners "constitute a very substantial portion of the community, a portion that cannot be intentionally and systematically excluded in all or in part without doing violence to the democratic nature of the jury system." 328 U.S. 217, 223. Two recent cases of the Court of Appeals for the Fifth Circuit have extended the application of this case. *Rabinowitz* v. *United States*, 366 F.2d 34 (5th Cir. 1966), struck down the "key man" system of jury selection in federal courts, which operated to get "blue ribbon" juries on which wealthier and more influential people of the dominant racial group were predominant. *Labat* v. *Bennett*, 365 F.2d 698 (5th Cir. 1966), held unconstitutional the Louisiana procedure of excluding daily wage earners from juries.

On two occasions the Supreme Court has considered methods of jury selection, which did not involve the out-

[5] It has also been held that Catholics cannot be excluded from jury duty. *Juarez* v. *State*, 102 Tex. Cr. R. 297, 277 S. W. 1091 (1925).

right exclusion of well-defined classes of citizens, but which had the potential of producing juries with a proneness to convict or a prosecutorial bias. In *Glasser* v. *United States,* 315 U.S. 60 (1942), the only women who could serve on the federal jury were members of the Illinois League of Women Voters who had attended jury classes, where the lecturers presented the view of the prosecution. The Court said:

> The deliberate selection of jurors from the membership of particular private organizations definitely does not conform to the traditional requirements of jury trial. No matter how high principled or imbued with a desire to inculcate public virtue such organizations may be, the dangers inherent in such a method of selection are the more real when members of those organizations from training or otherwise acquire a bias in favor of the prosecution.—315 U.S. 60, 86.

In *Fay* v. *New York,* 332 U.S. 261 (1947), the Court was faced with a challenge to state "blue ribbon" juries which were drawn from the general panel of jurors, after eliminating those exempted from general service, those who had been convicted of a criminal offense or found guilty of fraud or misconduct in a civil case, those who possessed conscientious scruples against the death penalty, those who doubted their ability to put aside opinions formed about a case, those who did not believe they could return a verdict of guilty based on circumstantial evidence, those who had such a prejudice against any law as would preclude finding a defendant guilty of its violation, those who had such a prejudice against any defense in a criminal action as would prevent giving a fair trial, and those who might hold against a defendant his failure to testify in his own behalf.

The "blue ribbon" juries were ordered by trial judges for important or complicated cases. The petitioners showed that certain classes of individuals, such as skilled and semi-skilled workers, laborers, and farmers were virtually unrepresented on the "blue ribbon" panel. Statistics from a period more than ten years prior to the trial in question showed that the ratio of conviction by "blue ribbon" juries was from 82% to 83%, whereas the ratio of conviction by regular juries was 37% to 43%. The Court determined that the petitioners had not proven the procedure was sufficiently prejudicial to themselves to establish denial of Fourteenth Amendment rights. However, the Court said, had the substantial discrepancy in percentage of convictions continued to the time of trial, this fact, in the absence of explanation, might be taken to indicate the "blue ribbon" jury was organized to convict. 332 U.S. 261, 286. Four of the Justices dissented. In his dissenting opinion Mr. Justice Murphy said:

> The Court demonstrates rather convincingly that it is difficult to prove that the particular petitioners were prejudiced by the discrimination practiced in this case. Yet that should not excuse the failure to comply with the constitutional standard of jury selection. We can never measure accurately the prejudice that results from the exclusion of certain types of qualified people from a jury panel. Such prejudice is so subtle, so intangible, that it escapes the ordinary methods of proof. It may be absent in one case and present in another; it may gradually and silently erode the jury system before it becomes evident.*

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* 332 U.S. 261, 300. The dissenting opinion also identified the right of a defendant to a jury representative of a cross-section of the community as a specific constitutional right. "But there is a

The state's use of challenges for cause in the present case to exclude from the jury those veniremen who had conscientious scruples against capital punishment denied to the petitioner the right of a jury composed of representatives of a cross-section of the community. Of the fifty-three prospective jurors examined, sixteen, or 30%, were excused upon the state's challenge for cause on the ground of opposition to capital punishment. (App. 72) In what material respect did the members of this group of 30%, excused for conscientious scruples against the death penalty, differ from the remaining prospective jurors?

B. Death-Qualified Juries Are in Fact Conviction-Prone Juries.

Prosecuting attorneys and defense lawyers have learned from experience that a juror's attitude on the death penalty is indicative of his attitude on various aspects of the judicial process, and, more specifically, that a juror who favors capital punishment is less likely to indulge in the presumption of innocence of the defendant, is more likely to believe the state's evidence than that of the defendant, and is more likely to convict than acquit. The conception is demonstrated by the frequent practice of prosecuting attorneys to put defendants on trial for a capital offense whether or not the state has enough evidence to obtain a conviction on the capital charge and when the prosecuting attorney intends for the case to be submitted to the jury on a lesser included non-capital offense, solely for the purpose of ob-

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constitutional right to a jury drawn from a group which represents a cross-section of the community. And a cross-section of the community includes persons with varying degrees of training and intelligence and with varying economic and social positions." 332 U.S. 261, 299.

taining a jury that will be friendlier to the prosecution and more apt to return a conviction.[7]

A theoretical framework for support of the observation that juries from which death-scrupled persons have been excluded are more likely to convict than juries from which such persons have not been excluded, is found in the book, *The Authoritarian Personality* by Adorno and others.[8] The authors identified two distinct and universally present personality types, the authoritarian personality and the non-authoritarian personality. Authoritarians are dogmatic. Non-authoritarians are open-minded, libertarian. In the language of the psychologists, the authoritarian tends to be moralistic, extra-punitive, distrustful and suspicious, non love-seeking, exploitive, manipulative, and opportunistic. In contrast the non-authoritarian shows tendencies toward permissiveness, impunitiveness or intra-punitiveness, trustingness, equalitarianism, and love-seeking. The authoritarians are roughly divided into those with politically rightist attitudes and those with politically leftist attitudes.[9]

One would expect politically rightist authoritarians to favor the death penalty, and non-authoritarians (and politically leftist authoritarians) to have conscientious scru-

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[7] L. R. McClelland, *Conscientious Scruples Against the Death Penalty in Pennsylvania*, 30 Pa. Bar Association Quarterly 252 (1959); W. E. Oberer, *Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?* 39 Tex. L. Rev. 545 (1961); W. E. Oberer, *The Death Penalty and Fair Trial*, [1964] The Nation 342.

[8] T. W. Adorno, Else Frenkel-Brunswik, D. J. Levinson, and R. N. Sanford, *The Authoritarian Personality* (1950).

[9] R. Christie and P. Cook, *A Guide to Published Literature Relating to the Authoritarian Personality Through 1956*, 45 Journal of Psychology 171 (1958).

ples against the death penalty. At the same time, the politically rightist authoritarian, who possesses the traits of punitiveness, distrustfulness, and suspicion would seem less inclined to accept the presumption of innocence of a criminal defendant, more inclined to believe the evidence of the state, and generally hostile to the defendant. On the other hand, the non-authoritarian, with a predisposition against punishing others, and general attitudes of permissiveness, of trustingness, would seem to have less of a desire to convict, expectably would be more sympathetic to the defendant's side of the case, and in general would have an open and lenient attitude toward criminal defendants.[10]

A jury composed of authoritarians and non-authoritarians selected randomly from the community should not be weighted either in favor of the defendant or in favor of the state, but a jury composed of politically rightist authoritarians, to the deliberate exclusion of all others, would be a jury prone to convict.

These theories have been tested in several psychological studies. The most thorough examination of the subject appears to be that of R. F. Crosson, *An Investigation Into Certain Personality Variables Among Capital Trial Jurors* (1966).[11] This investigator worked with one sample of thirty-six subjects who had served on capital juries in Cuyahoga County, Ohio, and a second set of thirty-six subjects who had served on non-capital juries in the same county and who stated they had scruples against the death

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[10] This theory is developed by W. E. Oberer, *op. cit., supra* n. 7.

[11] Unpublished doctoral dissertation on file in Department of Psychology, Western Reserve University.

penalty.[12] All of the subjects were tested using four standard psychological tests, one for gauging dogmatism, a second for measuring opinionation, a third for measuring critical thinking, and a fourth for testing manifest hostility.[13] The results showed death-qualified jurors to be more conservative than jurors with death scruples by a highly significant measure. Also shown were tendencies of death-qualified jurors to be more dogmatic than jurors with death scruples, and for death-qualified jurors to be more manifestly hostile than jurors with death scruples. Further, there was some evidence that jurors with scruples against the death penalty tended to be better in critical thinking than death-qualified jurors. No difference between the jurors groups as to opinionation was observed.[14] The author concluded, "The death qualification in the voir dire, instead of insuring impartiality, seems rather to undermine the defendant's right to a fair trial because of a personality selectivity which may predispose the jury to his disadvantage."[15]

The description and results of two psychological studies on the relationship between willingness to impose the death

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[12] R. F. Crosson, *op. cit. supra* at n. 11, pp. 43-44.

[13] R. F. Crosson, *op. cit. supra* at n. 11, pp. 15-18, 52-54.

[14] R. F. Crosson, *op. cit. supra* at n. 11, pp. 58-65. The "highly significant" conservatism-liberalism difference, p. less than .001, exceeded by far the alpha criterion of .05. The other tendencies, though relevant, could not be deemed "statistically significant" because they did not exceed this alpha criterion.

[15] R. F. Crosson, *op. cit. supra* at n. 11, Abstract p. 4. "If anti-authoritarian traits are as likely to be represented on the jury as authoritarian traits, then the results of this study suggest that removal of the death qualification from the capital voir dire would be a step in the direction of fairer representation which might better serve justice instead of just the prosecutor."—R. F. Crosson, *op. cit. supra* at n. 11, p. 82.

penalty and inclination to find a criminal defendant guilty were brought to the attention of the Supreme Court of North Carolina by the petitioner, but there is no indication in the opinion that this material was considered by the Court. One was a study conducted by Dr. Faye Goldberg, Assistant Professor of Psychology, Morehouse College, Atlanta, Georgia. (App. 73-77) Dr. Goldberg gave one hundred Negro and one hundred white college students a questionnaire in which several criminal cases were described, ranging in severity of the crime committed. All were cases in which the death penalty could have been given. The subjects were asked to record their judgments as to guilt or innocence. In the questionnaire they were also asked if they had conscientious scruples against the use of the death penalty. The most significant result was that subjects who said they did not have conscientious scruples against the death penalty were more likely to render judgments of conviction, than the subjects who said they did have conscientious scruples against the death penalty.[16] The other study brought to the attention of the Supreme Court of North Carolina was Cody Wilson, *Impartial Juries?*, The Texas Observer (Nov. 17, 1964). (App. 78-80) Dr. Wilson's study also used a questionnaire, which was circulated among two hundred persons, mostly college students. Each student was asked to reach a decision as to guilt or innocence based on written descriptions of five

[16] Sixty-one per cent of the sample answered that they did have conscientious scruples against the death penalty. Other results of the study were that subjects who said they had conscientious scruples against the death penalty (compared with the subjects who said they did not have conscientious scruples against the death penalty), were less likely to convict for a more serious crime than for a lesser crime, were less likely to reject the plea of not guilty by reason of insanity, and were less likely to impose a more severe sentence when they did convict. (App. 76-77)

simulated capital cases. Each subject was asked to indicate the degree of confidence he had in the decisions, and to state whether he had conscientious scruples against the death penalty. The subjects were also asked to agree or disagree with a series of statements, including statements to the effect that the district attorney's interpretation of the facts in a criminal case is usually more reliable than that of the defense lawyer, and that if two witnesses were to give conflicting testimony in a criminal case, the witness for the prosecution would be more believable than the witness for the defense. Among the results of the study were:

(1) People who believe in capital punishment are more likely to judge guilty in response to the cases than are people who do not believe in capital punishment.

(2) People who believe in capital punishment are more confident of the correctness of their judgments of guilt and innocence.

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(4) People who believe in capital punishment are more likely to be biased in favor of the prosecution and against the defendant.[17]

A study by Hans Zeisal, of the University of Chicago Law School, *Some Insights into the Operation of Criminal*

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[17] App. 79-80. It was also found that people who believe in capital punishment are more likely to assess a more severe punishment—even without the death penalty—than are people who have scruples against capital punishment; and that people who believe in capital punishment are more likely to be biased against insanity as a defense than are people who have scruples against capital punishment. (App. 78-80)

Juries (unpublished, on file at the University of Chicago Law School—1957), produced results consistent with the material described above. This study was based on interviews with a number of jurors in Chicago and New York after completion of their terms of service on criminal juries. A formula dependent on the vote of the particular juror and the total number of votes for acquittal or conviction on the initial ballot was used to divide the jurors into five groups, ranging from "very prosecution prone" to "very defense prone." The jurors who had scruples against the death penalty were found to be "somewhat defense prone," and the jurors who had no conscientious scruples against the death penalty were found to be "somewhat prosecution prone." [18]

In the present case 30% of the prospective jurors examined were excluded by reason of conscientious objection to the death penalty. Rates of exclusion of as high as 90% of the jurors examined have been reported.[19] The experience of the criminal bar is that in virtually every capital case a very substantial number of prospective jurors are not permitted to serve because they are opposed to the death penalty. The Gallup Poll provides an index of national public sentiment on the death penalty. In response to the question "Are you in favor of the death penalty for persons convicted of murder?" the 1966 survey showed 42% in favor of the death penalty, 47% opposed to it, and 11% without opinion. The 1953 survey showed 68% in

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[18] H. Zeisel, *Some Insights into the Operation of Criminal Juries* (unpublished, on file University of Chicago Law School—1957) 42-43.

[19] L. R. McClelland, *Conscientious Scruples Against the Death Penalty in Pennsylvania*, 30 Pa. Bar Association Quarterly 252 (1959).

favor of capital punishment, 25% opposed to it, and 7% without opinion. Opposition to the death penalty increased with each successive survey between 1953 and 1966.[20]

Undoubtedly many of the people who are opposed to the death penalty would not refuse to consider the death penalty if asked to do so by the prosecuting attorney and by fellow jurors, especially in the case of an unusually heinous crime, and in many courts such persons could be rehabilitated successfully on voir dire for service on a capital jury. But even if the percentage of the average jury venire which would have to be excused for death scruples in a capital case is well below the Gallup Poll figure of 47%, the true figure must nevertheless be a very substantial one. The device of exclusion for death scruples deprives criminal defendants of the right to be tried by representatives of this very large segment of the general community. When challenges for cause on the grounds of scruples against the death penalty were first used, there was not the widespread opposition to the death penalty that exists today. The problem raised by the present case did not assume its grave character until relatively recent times. Oberer has stated the problem in these terms:

> [T]he gulf between the community and death-qualified jury grows as the populace becomes more infected with modern notions of criminality and the purpose of punishment. Accordingly, the community support for the death penalty becomes progressively narrower, with all that this connotes for the administration of justice. Moreover, as the willingness to impose the death penalty—that is, to be sworn as a juror in a capital

[20] American Institute of Public Opinion, *Gallup Poll Release* (July 1, 1966).

> case—wanes in a particular community, the prejudicial effect of the death qualified jury upon the issue of guilt or innocence waxes; to man the capital jury, the resort must increasingly be to the extremists of the community—those with the least contact with modern ideas of criminal motivation, with the constant refinement of the finest part of cultural heritage, the decidation to human charity and understanding.—W. E. Oberer, *Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?* 39 Tex. L. Rev. 545, 556-57 (1961).

The psychological studies incidentally support the judgment of the courts that criminal defendants are prejudiced when members of a particular race, ethnic group, sex, religion, political party, or economic group are deliberately excluded from serving on juries. The study by Hans Zeisal indicated substantial differences in prosecution proneness and defense proneness among women, high income groups, high age groups, low education level groups, persons of Slavic and Italian descent, persons of Irish and English descent, native Americans, Negroes, Protestants, and Jews.[21] Some differences in sex are noted in a study by F. L. Strodtbeck and R. D. Mann.[22]

Of further relevance to the present case, considered in the light of established authority against discrimination in jury composition based on race and sex, are some secondary findings in the studies described above. Crosson's work

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[21] *Op. cit. supra* n. 18, at 29-31.

[22] *Sex Role Differentiation in Jury Deliberations*, 19 Sociometry 3 (1956).

produced a finding that females tended to be more opinionated and at the same time more liberal than males.[23] These findings would indicate that prospective female jurors are more likely than prospective male jurors to be excluded for scruples against the death penalty. In Crosson's limited sample, he found more women jurors than male jurors opposed to capital punishment. This would be consistent with the 1966 Gallup Poll survey, where 47% of the men were found to favor the death penalty, while 38% of the women favored it.[24] Dr. Goldberg found a marked racial difference in attitudes toward capital punishment—76% of the Negro subjects said they had conscientious scruples against the death penalty, as opposed to 47% of the white subjects. (App. 77) The present case is illustrative of the tendency of the challenge for conscientious scruples against the death penalty to eliminate disproportionate numbers of women and Negroes from the jury. Three of the six, or 50% of the Negro prospective jurors were eliminated on this ground, and five of the eight, or 62.5% of the female prospective jurors were eliminated on this ground, whereas 30% was the comparable figure for all of the jurors examined. (App. 72)

C. Exclusion of Jurors With Death Scruples Has No Common Law Basis.

In the early Nineteenth Century, England had a list of some two hundred and thirty capital offenses. It is familiar

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[23] R. F. Crosson, *An Investigation into Certain Personality Variables Among Capital Trial Jurors* 68-69 (unpublished dissertation on file Department of Psychology, Western Reserve University, 1966).

[24] R. F. Crosson, *op. cit. supra* n. 23, p. 49; American Institute of Public Opinion, *Gallup Poll Release* (July 1, 1966).

history that the juries of the time felt the death penalty so disproportionate to most of these crimes that they conspicuously refused to convict.[25] Why was not the crown's challenge for cause on the ground of conscientious scruples against the death penalty invoked to eliminate this practice? The answer seems to be that at the common law there was no challenge for cause for conscientious scruples against capital punishment. At the common law challenges to the polls, or individual jurors, were divided into four categories: (1) propter honoris respectum, excuse on the ground of noble rank; (2) propter defectum, elimination because of being an alien, a slave or bondsman, or want of sufficient estate of freehold or copyhold; (3) propter affectum, excuse for bias or partiality, where the juror is of kin to the defendant, has an interest in the cause, has been a party to an action against the defendant, has formerly been a juror in the same cause, or is the defendant's master, servant, counsellor, steward, attorney, or of the same society or corporation;[26] (4) propter delictum, excuse for a crime or misdemeanor rendering the juror infamous. There was also a miscellaneous category of challenges for cause, some of which were customary and others were by virtue of statutes enacted before the common law was established on the American continent; thus there were

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[25] H. Kalven and H. Zeisel, *The American Jury* 310-312 (1966).

[26] The enumerated challenges propter affectum are *principal* challenges which, if true, could not be overruled. There were also challenges propter affectum to the *favour*, which were for some probable circumstance of suspicion, such as acquaintance with the defendant; the validity of challenges to the *favour* were left to the determination of the *triors*. The *triors*, in the case of the first man called being challenged, were two indifferent persons named by the Court; they were joined by the first juror chosen; and once two jurors were seated, the original *triors* were superseded, and the two first sworn on the jury tried the rest.

excuses for sick and decrepit persons, non-residents, men above seventy years old and persons under twenty-one years old, physicians, attorneys, court officers, and certain clergymen.[27]

Nowhere in the enumeration of challenges is mentioned a challenge for scruples against the death penalty. Two of the earliest American cases which considered the allowance of a challenge for cause on the grounds of conscientious scruples against capital punishment state that no English case has been found on the point.[28]

The earliest English case to be found on this question is *Mansell* v. *Regina*, 8 El. & Bl. 85, 120 Eng. Reprint 32 (Ex. Ch. 1857), which was decided after the common law became fixed in the United States. There one of the jurymen, after going into the box but before being sworn, spontaneously said he had scruples against the death penalty. Counsel for the crown, without assigning cause, prayed the Court that the juror be ordered to stand by. Counsel for the prisoner prayed he show ground for challenge. The Court said, "Undoubtedly, if you feel you cannot do your duty, you are quite right in saying so, and had better withdraw." The juror withdrew. The Court then ordered that the juror "stand by." Peremptory challenges, though allowed to the prisoner, were denied to the king by statute, 33 Edw. I st. 4, re-enacted by 6 Geo. IV, c. 50, s. 29. This statute was ef-

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[27] 3 Blackstone, *Commentaries* *361-365; 1 Coke, *Institutes* *156; 4 Blackstone, *Commentaries* *352.

[28] *Clore's Case*, 49 Va. (8 Gratt.) 606 (1851); Gibson, C.J., dissenting, in *Commonwealth* v. *Lesher*, 17 Serg. & Rawle 155, 161 (Pa. 1828): "If the Crown had all along a right to challenge for this cause, instances of the exercise of it must have occurred. Chief Justice Wray used to compare a case without a precedent to a bastard that had no cousin. . . ."

fectively circumvented by the practice of counsel for the crown, tolerated by the courts, to require unwanted jurors to stand by until the entire panel was gone through, it being necessary for cause to be shown only when the panel was exhausted.[29] The holding in *Mansell* v. *Regina* was grounded on this practice; the Court decided the crown was not bound to challenge the juror for cause until the whole panel had been exhausted.[30]

Quakers were disabled from serving on juries in England by Stat. 7 and 8 Wm. III, ch. 21, and this enactment had the incidental effect of eliminating many jurors with death scruples, but as Gibson, C.J., said, "It is notorious that members of other religious denominations deny the lawfulness of capital punishment." *Commonwealth* v. *Lesher*, 17 Serg. & Rawle 155, 161 (Pa. 1828).

Thus, at the common law, the crown in removing jurors with death scruples, was limited to a practice analogous to the peremptory challenge and to the statute disabling Quakers from jury service. These limitations must have been at the root of the extraordinary number of acquittals in capital cases in early Nineteenth Century England.

In *Commonwealth* v. *Lesher, supra,* the earliest American state case giving any extensive discussion to the question of whether there was a challenge for scruples against the death penalty, Chief Justice Gibson, dissenting, said,

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[29] 4 Blackstone, *Commentaries* *353; 2 Hawkins, *Pleas of the Crown* *413.

[30] The Exchequer Chamber opinion contained dictum by Willes, J., that a man with conscientious scruples against capital punishment, who would be unable to find a verdict of guilty according to the evidence, could be challenged for cause, but no authority was cited for this proposition.

"But the naked fact that no case of the sort has arisen in England, or our sister states, or has arisen in Pennsylvania, *previously to the entire abolition of peremptory challenges by the Commonwealth,* shows conclusively the nature of the mischief, and the remedy for it at the common law." 17 Serg. & Rawle 155, 162.

The great majority of American courts agreed with the majority opinion in *Commonwealth* v. *Lesher* and held the state is entitled to a challenge for cause on the ground of conscientious scruples against the death penalty.[31] In some of these cases the courts were concerned as much with violating the conscience of the jurors, as with according the state a fair trial. *E.g., United States* v. *Cornell,* 2. Cranch C.C. 477, F.Cas. No. 16641 (C.C. R.I. 1820).

The predominant rationale, however, is reflected in an opinion of the Supreme Court of North Carolina:

> A man who has conscientious scruples against capital punishment, no matter how much disposed to discharge his duty, would be an unsafe juror, because he would naturally be influenced by his prejudices and go into the jury-box with such a bias in favor of the prisoner as would render him incompetent to do justice to the State.—*State* v. *Bowman,* 80 N.C. 432, 436-37 (1877).

The courts of Iowa and South Dakota have taken a contrary view. These courts have interpreted state statutes enumerating challenges for cause to hold the state has no right to challenge jurors for cause on the ground of conscientious scruples against the death penalty.

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[31] The cases are collected in Annot., 48 A.L.R. 2d 560 (1956).

> It cannot be said that the state is entitled to have the punishment by death inflicted on any case. The statute authorizes that punishment, in the discretion of the jury, when a person is convicted of murder in the first degree; but the State has no right to a trial by jurors who have no objection against inflicting the death penalty, except as it can secure them by challenging peremptorily those who have such objections. —*State* v. *Lee*, 91 Iowa 499, 502-503, 60 N.W. 119, 121 (1894).

The South Dakota court maintained the same position, *State* v. *Garrington*, 11 S.D. 178, 76 N.W. 326 (1898), until the rule was changed by statute, S. Dak. Laws 1927, ch. 94 (presently codified in S. Dak. Code § 34.3618(10)).

D. The State Is Without Legitimate Interest in Demanding Death-Qualified Juries.

In times past when the death penalty was mandatory for almost all capital crimes, there was considerable justification for allowing challenges of jurors with death scruples, in that if such jurors followed their consciences instead of the charge of the court, they would be compelled to vote for acquittal, and even in cases of clear guilt, the result would be acquittal or a hung jury. At present this reasoning is no longer applicable because the jury now is vested with discretion in capital cases to return a verdict which requires the imposition of a sentence for life imprisonment, instead of execution.[32]

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[32] The relevant North Carolina statutes are N.C.G.S. § 14-17 (murder), § 14-21 (rape), § 14-52 (burglary), and § 14-58 (arson). See R. E. Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. Pa. L. Rev. 1099 (1953).

The only right the state presently can assert for the challenge of jurors with death scruples is the right of the state to seek the death penalty. It has been pointed out that prosecuting attorneys frequently assert this right as a pretense, when they have no actual intention of seeking the death penalty, but simply want a jury more friendly to the prosecution. In 1966 there was a single execution in the United States. In 1965 seven persons were put to death. There is great popular dissatisfaction with the denth penalty, as evidenced by the dwindling annual number of persons put to death, by the increasing percentage of persons opposed to capital punishment recorded by the Gallup Poll, and by the growing number of states which have abolished capital punishment.[33] With the death penalty fallen into

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[33] The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts* 27 (1967): "The most salient characteristic of capital punishment is that it is infrequently used. During 1966 only 1 person was executed in the United States; the trend over the last 36 years shows a substantial decline in the number of executions from a high of 200 in 1935 to last year's low of 1. All available data indicate that judges, juries, and Governors are becoming increasingly reluctant to impose or authorize the carrying out of a death sentence. Only 67 persons were sentenced to death by the Courts in 1965, half the number of death sentences imposed in 1961; and 62 prisoners were relieved of their death sentences by commutation, reversals of judgment, or other means. In some States in which the penalty exists on the statute books, there has not been an execution in decades.

"This decline in the application of the death penalty parallels a substantial decline in public and legislative support for capital punishment. According to the most recent Gallup Poll, conducted in 1966, 47 per cent of those interviewed were opposed to the death penalty for murder, while 42 per cent were in favor of it; a poll conducted in 1960 on the same question reported a majority in favor of the death penalty. Since 1964 five States effectively abolished capital punishment. There are now eight States in which the death penalty is completely unavailable and five States in which it may be imposed only for exceptional crimes such as murder of a prison guard or an inmate by a prisoner serving a life sentence, murder of a police officer, or treason."

this condition of disuse, the prospect of the state's successfully obtaining a death penalty in any given case is extraordinarily remote. Moreover, the decision between life and death in North Carolina and elsewhere is in the unbridled discretion of the jury[34]—no standards for their guidance are required or permitted. No sound reason appears why a juror with conscientious scruples against the death penalty should not be competent under this rule to carry to the jury room his notions of the rehabilitative function, as opposed to the retributive and deterrent functions, of punishment. This juror's vote against capital punishment would violate no instruction of the judge; it would simply be an exercise of the unlimited discretion conferred upon the jury to fix the penalty. In asserting the right to challenge jurors with death scruples for cause, the state pursues a narrow and remote interest. Nevertheless, the Supreme Court of North Carolina in the present case, together with courts of several other states, hold that this interest of the state is paramount to the interest of the defendant in securing a trial by an impartial jury.

It might be objected that the relief requested by the petitioner in this case would necessarily abolish the death penalty. Experience indicates this is not true. In Iowa, where the prosecution has been without the challenge for cause of jurors with death scruples since the 1890's, death sentences have in fact been imposed and executions have in fact been carried out. Between 1930 and 1960 at least 10 death sentences, based on jury recommendations for the death penalty, were appealed to the Supreme Court of

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[34] See *State* v. *Manning*, 251 N. C. 1, 110 S.E. 2d 474 (1959); and statutes collected in concurring opinion by Frankfurter, J., in *Andres* v. *United States*, 333 U. S. 740, 766-770 (1948).

Iowa. In the same period, nine defendants were given death sentences upon guilty pleas and appealed their cases to the Supreme Court of Iowa.[35]

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[35] In the following table data from Iowa, the state without a challenge for cause of death-scrupled jurors, is compared with data from Nebraska. Nebraska is contiguous to Iowa and the two states have much in common historically, culturally, and economically. In Nebraska the state is allowed to challenge for cause jurors with scruples against capital punishment. *St. Louis* v. *State*, 8 Neb. 405, 1 N.W. 371 (1879). In Iowa the state has 8 peremptory challenges and 2 "strikes" in a capital case. Iowa Code Ann. Tit. 36 § 779.11 (1939). In both Iowa and Nebraska, the jury returning a verdict in a capital case must determine a sentence of either death or life imprisonment; the determination is binding upon the judge. Iowa Code § 12911 (1939); Neb. Rev. St. § 28-401 (1943). Capital punishment was abolished in Iowa in 1965. The population figures are taken from 1968 *World Almanac* 261. The murder and manslaughter rates are from Federal Bureau of Investigation, *Uniform Crime Reports for the United States* (1942, 1950, 1960). Figures for executions are taken from U. S. Bureau of Census, *Statistical Abstract of the United States* 166 (87th ed. 1966). Figures for appealed capital cases are derived by counting the cases reported in Volumes 228 N. W. through 100 N. W. 2d.

		Iowa	*Nebraska*
Murder and Voluntary Manslaughter Rates (per 100,000 population)			
	1960	.6	2.3
	1950	.7	1.4
	1942	1.3	3.8
Population			
	1960	2,757,537	1,411,330
	1950	2,621,073	1,325,510
	1940	2,538,268	1,315,834
	1930	2,470,039	1,377,963
Executions			
	1950-1959	1	2
	1940-1949	7	2
	1930-1939	8	0
Murder Convictions, 1950-1959, Appealed			
Jury recommended death		2	3
Jury recommended life imprisonment		2	2

(*footnote continued on next page*)

It might also be objected that granting the relief prayed by the petitioner would result in an inordinately large number of hung juries. (See the opinion of the Supreme Court of North Carolina in the present case.) (App. 85-86) This

	Iowa	*Nebraska*
Life imprisonment—recommendation not set out	0	3
Sentence not set out	2	0
Jury convicted lesser offense—second degree, manslaughter, etc.	11	1
Guilty plea—death penalty	3	0
Guilty plea—life imprisonment	1	0
Murder Convictions, 1940-1949, Appealed		
Jury recommended death	2	3
Jury recommended life imprisonment	5	0
Life imprisonment—recommendation not set out	2	2
Sentence not set out	2	1
Jury convicted lesser offense—second degree, manslaughter, etc.	10	2
Guilty plea—death penalty	2	0
Guilty plea—life imprisonment	1	0
Murder Convictions, 1930-1939, Appealed		
Jury recommended death	6	0
Jury recommended life imprisonment	1	2
Life imprisonment—recommendation not set out	7	3
Sentence not set out	6	1
Jury convicted lesser offense—second degree, manslaughter, etc.	20	8
Guilty plea—death penalty	4	0
Guilty plea—life imprisonment	1	0
Summary 1930-1959		
Jury recommended death	10	6
Jury recommended life imprisonment	8	4
Life imprisonment—recommendation not set out	9	8
Sentence not set out	10	2
Jury convicted lesser offense—second degree, manslaughter, etc.	41	11
Guilty plea—death penalty	9	0
Guilty plea—life imprisonment	3	0

objection is based neither on proven facts nor upon sound reasoning. A jury almost invariably disagrees on the first ballot. The jury verdict in almost all cases, civil and criminal, is the product either of compromise or of successful persuasion by one faction of the jury. The same will hold true in a capital case where jurors with death scruples have not been excluded. There would be the distinct possibility that a juror who professes death scruples will be won over by the persuasion of his fellow jurymen, especially in the case of an atrocious or heinous crime. In any event, there would always be room for compromise resulting in a discretionary verdict of life imprisonment instead of death, or a verdict convicting of a lesser included noncapital offense. As in Iowa, the prosecuting attorneys would still possess the right to exercise peremptory challenges to exclude jurors with scruples against capital punishment.[36] Finally, there could be recourse to the bifurcated trial used in several states for capital cases, in which separate juries pass upon the guilt or innocence issue and the issue of life or death sentence.[37]

E. Removal of Death-Scrupled Jurors for Cause Is a Denial of Due Process, Equal Protection, and the Right to Trial by Impartial Jury.

The allowance of the state's challenges for cause of prospective jurors with conscientious scruples against capital punishment in the petitioner's trial denied the petitioner equal protection of the laws and due process of law in violation of the Fourteenth Amendment and denied him trial by an impartial jury in violation of the Sixth Amend-

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[36] *Cf., Swain* v. *Alabama*, 380 U. S. 202 (1965).

[37] *E.g.*, Calif. Penal Code, § 190.1; Tex. Code Crim. Proc. § 37.07.

ment. The Fourteenth Amendment grounds are stated by the Supreme Court in *Fay* v. *New York,* 332 U. S. 261 (1947). "[A] discretion, even if vested in the court, to shunt a defendant before a jury so chosen as greatly to lessen his chances while others accused of a like offense are tried by a jury so drawn as to be more favorable to them, would hardly be '*equal protection of the laws*'." 332 U. S. 261, 285. [Emphasis added.] "Undoubtedly a system of exclusions could be so manipulated as to call a jury before which defendants would have so little chance of a decision on the evidence that it would constitute a denial of *due process.*" 332 U. S. 261, 288. [Emphasis added.]

Most of the decisions striking down exclusion from jury duty of members of the defendant's race, sex, religion, or other class invoke the Equal Protection Clause. ***E.g.,*** *Smith* v. *Texas,* 311 U.S. 128 (1940). Such cases have been extended rightly to hold the Equal Protection Clause violated when the exclusion of a class of jurors is injurious to the defendant, without regard to whether he is a member of that class. *Allen* v. *State,* 110 Ga. App. 56, 137 S.E. 2d 711 (1964) (white civil rights worker tried by a jury from which Negroes were excluded). There was a denial to the petitioner of equal protection of the laws in that the exclusion from jury service of the class of persons with death scruples was of itself a classification injurious to the petitioner, which was not grounded upon any legitimate state interest. *Smith* v. *Texas, supra.* Also, by the state's use of challenges for cause of jurors with death scruples, the petitioner, as a defendant in a capital case, was denied equal protection of the laws because members of his class of capital defendants were burdened with a disability not extended to the class of non-capital defen-

dants, and this classification by the state was unsupported by any legitimate state interest. *Fay* v. *New York, supra.*

Several lower courts have elaborated on the principle expounded in *Fay* v. *New York, supra,* that a system of jury exclusions can violate due process of law. *Labat* v. *Bennett,* 365 F. 2d 698 (5th Cir. 1966), holds the exclusion of daily wage earners from juries as a class is in violation of the Due Process Clause, because it upsets the integrity of the fact-finding process, which depends on impartial venires representative of the community as a whole. Also in *State* v. *Madison,* 240 Md. 265, 213 A. 2d 880 (1965), the conviction of a defendant who was a member of the Apostolic faith and believed in the existence of God, was overturned on due process grounds, where the jurors had been required to demonstrate a belief in the existence of God.

The Sixth Amendment clause requiring trial by impartial jury is declarative of a common law right cherished by English-speaking peoples. The denial of the right of trial by jury was one of the sparks that ignited the American Revolution. This right was incorporated into the Federal Constitution and the constitution of every state. The Supreme Court declared the fundamental Sixth Amendment right of trial by impartial jury to be binding upon the states in *Parker* v. *Gladden,* 385 U. S. 363 (1966). There a conviction was reversed because a bailiff said in the presence of jurors that the defendant was guilty and also that if there was anything wrong with the finding of guilty the Supreme Court would correct it. This case can be distinguished from *Maxwell* v. *Dow,* 176 U. S. 581 (1900), where it was held permissible for a state to use an eight-man, instead of a twelve-man jury, in a non-

capital case.[38] The distinction is between fundamental criteria of trial by impartial jury, which are within the scope of the federal Constitutional guarantee, and matters not reaching to the central fairness and impartiality of trial by jury, which should be left to the governance of the states.[39] The petitioner in this case has been denied an essential requisite trial by an impartial jury; the removal of jurors with conscientious scruples against the death penalty had the effect of weighting the jury in favor of the prosecution, of making the jury conviction-prone.

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[38] Of course, the dictum in *Maxwell* v. *Dow* that the Sixth Amendment right of trial by jury is not applicable to the states, was clearly rejected by *Parker* v. *Gladden*. The remaining Sixth Amendment guarantees have been extended to state trials: speedy trial by *Klopfer* v. *North Carolina*, 386 U. S. 13 (1967); public trial by *Re Oliver*, 333 U. S. 257 (1948); being informed by the nature and cause of the accusation by *Williams* v. *New York*, 337 U. S. 241 (1941); being confronted with witnesses against the defendant by *Pointer* v. *Texas*, 380 U. S. 400 (1965); the assistance of counsel for defense by *Gideon* v. *Wainwright*, 372 U. S. 335 (1963); compulsory process for obtaining witnesses in the defendant's favor by *Washington* v. *Texas*, 388 U. S. 14 (1967).

[39] Compare *Ker* v. *California*, 374 U. S. 23 (1963), holding only the "fundamental criteria" of the Fourth Amendment binding upon the states.

II.

The Petitioner's Rights Under the Fourteenth and Fourth Amendments Were Violated by the State of North Carolina by the Introduction of a Rifle at His Trial, on the Ground That It Had Been Taken by Voluntary Consent From the Petitioner's Dwelling, When the Police Officers Had Gained Entry to the House by Producing a Piece of Paper They Claimed to Be a Search Warrant.

A. There Was No Voluntary Consent to the Search of Petitioner's House.

At the petitioner's trial, a rifle seized from his home provided a key piece of evidence for the state. The uncontradicted opinion testimony of the state's ballistic expert was that the .22 caliber Remington rifle seized from the petitioner's home fired the .22 caliber bullet taken from the body of one of the victims, and the two .22 caliber cartridge cases found at the place where the victims had been bound to trees and shot. (App. 63-64)

Shortly after the petitioner was placed under arrest and jailed, four white officers drove to the house where he lived with his grandmother, Mrs. Hattie Leath. Mrs. Leath is a Negro widow and was then sixty-six years old. She lives at the end of a dirt road a mile from the nearest state-maintained highway. The only persons home with her at the time were some of her infant grandchildren. Mrs. Leath recognized the men to be sheriff's deputies. One of the officers approached her front door and said, "I have a search warrant to search your house." Thereupon Mrs. Leath walked out to the porch and allowed the officers to enter. She later testified that she had not

thought she had any choice in the situation. She testified, "He said he was the law and had a search warrant to search the house, why I thought he could go ahead." The officer did not read the search warrant to Mrs. Leath; she took him at his word. The officers found the .22 caliber Remington rifle in a wardrobe off the living room. (App. 7-8, 46-48)

At the trial, the state's solicitor abandoned reliance on the purported search warrant (which was never made a part of the record) and elected to rely solely on the theory that the petitioner's grandmother had freely and voluntarily consented to the search of her house. (App. 43)

When the search of a private home is conducted on the strength of a paper the officer represents to be a search warrant, a finding that the peaceful submission of the occupant to a search *with* a warrant in fact constitutes voluntary consent to a search *without* a warrant, defies reason and is a gross distortion of the Fourth Amendment protection against search and seizure without probable cause.

The Supreme Court declared applicable to the states the Fourth Amendment principle of excluding the fruits of searches and seizures without probable cause in *Mapp* v. *Ohio,* 367 U.S. 643 (1961). It was decided in *Ker* v. *California,* 374 U.S. 23 (1963), that the standard of reasonableness is the same under the Fourth and Fourteenth Amendments, and the state courts must conform to the "fundamental criteria" laid down by the Fourth Amendment and by opinions of the Supreme Court applying that amendment. Save for searches made incident to a lawful arrest and certain other exceptions not relevant here, to come within the Fourth Amendment standards, a search

either must be based on a valid search warrant, or the person whose premises are searched must freely and voluntarily consent to a search without a warrant.[40]

The exclusionary rule has been received with resentment and confusion in some quarters.[41] Some law enforcement agencies appear unwilling to learn the basic Fourth Amendment requirements for search and seizure with a warrant —the concept of probable cause and the procedure of drafting sufficiently informative affidavits and obtaining the issuance of warrants by a magistrate. They may be deterred by a belief that the requirements of a valid search warrant are much more technical and refined than the Supreme Court requires them to be.[42] As any lawyer who frequents state criminal courts can testify, the growing practice of police and prosecutors is to rely on consents to searches instead of search warrants.[43]

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[40] Compare *Aguilar* v. *Texas*, 378 U.S. 108 (1964), and *Johnson* v. *United States*, 333 U.S. 10 (1948).

[41] See Comment, *Circumventing the Exclusionary Rule*, 15 U. Fla. L. Rev. 427 (1962); D. W. Silverman, *Protecting the Public from Ohio v. Mapp*, 51 A.B.A.J. 243 (1965); J. B. Weinstein, *Local Responsibility for Improvement of Search and Seizure Practices*, 34 Rocky Mt. L. Rev. 150 (1962).

[42] See *United States* v. *Ventresca*, 380 U.S. 102 (1965).

[43] American Bar Foundation, *Law Enforcement in the Metropolis*, 33-34, 38 (D. M. McIntyre, Jr. ed. 1967), reports on police search practices in Detroit: "The search warrant is used only when the object of the search is a building—usually a dwelling. Because it is the most formalized means for conducting a search and is historically recognized as the most accepted procedure, one would expect frequent resort to the search warrant as a means of searching premises; yet the contrary is true. . . . Observations clearly show that premises are frequently searched by other means, both lawful and unlawful, which are discussed in more detail below.

"A number of police officers were questioned as to the reason for the lack of the use of search warrants. The officers almost uniformly

The Supreme Court has consistently recognized that searches purportedly conducted with the consent of the person in charge of the premises, unless closely scrutinized and regulated, will sap the vitality of the Fourth Amend-

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indicated that they had no knowledge of search warrants, rarely had occasion to obtain one, and were at somewhat of a loss to explain the lack of their use. . . . Two state police officers had this to say concerning search warrants:

> 'We've never had to get a search warrant since the other officer and myself had been at this post, but I suppose you would do it like you would any other warrant. We have gone into people's houses, but only when they have permitted us to do so. For example, only last week we went into an individual's house and looked around, but we only did so when his mother permitted us to search the place.' The troopers claim they 'try to talk the person into it,' *i.e.*, into searching the premises, when and if they feel it is necessary.

"Investigations were observed in which the police felt a search was highly desirable, but they lacked the requisite probable cause to effect an arrest (followed by an incidental search) or to acquire a search warrant. In these circumstances, the police would resort to another major alternative for conducting a lawful search *with consent* from the person to be searched or from the one who had control of the premises to be searched." One of the prosecuting attorneys said a principal reason for the small number of search warrants was that search and seizure is so easily conducted without a search warrant, that it seems fairly useless to go to the trouble, the time, and expense of having one issued. A prosecuting attorney said it was not easy to comply with the exacting standards for search warrants, that defense attorneys constantly jab at search warrants on every conceivable proposition.

In 1954 when federal law enforcement officers were troubled by the constitutional standards for search warrants, as state law enforcement officers are at present, a federal Court of Appeals remarked upon "this increasing practice of Federal officers searching a home without a warrant on the theory of consent . . ." *United States* v. *Arrington*, 215 F.2d 630, 637 (7th Cir. 1954).

The present widespread employment of the consensual search device is reflected by the great volume of litigation on the subject. Many of the cases are collected in Annot., 31 A.L.R.2d 1078 (1953); 9 A.L.R.3d 858 (1966). See Note, 113 U. Pa. L. Rev. 260 (1964); Comment, [1964] U. Ill. L. Forum 653; Note, [1964] Wis. L. Rev. 119.

ment. In *Amos* v. *United States,* 255 U.S. 313 (1921), the Court rejected evidence obtained in this kind of a search, saying, "The contention that the constitutional rights of the defendant were waived when his wife admitted to his home the government officers who came, without warrant, demanding admission to make search of it under government authority cannot be entertained . . . . [I]t is perfectly clear that, under the implied coercion here presented, no such waiver was intended or effected." 255 U.S. 313, 317. In *Johnson* v. *United States,* 333 U.S. 10 (1948), evidence obtained in a purportedly consensual search was rejected. There an officer, who detected the odor of opium outside a hotel room, knocked on the door and identified himself as an officer. When a woman opened the door, the officer said he wanted to speak to her. She stepped back "acquiescently," in the words of the officer, and admitted the officers to the room. The Court said, "Entry to defendant's living quarters, which was the beginning of the search, was demanded under color of office. It was granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right." 333 U.S. 10, 13. The spirit of these decisions has been developed into a set of precepts for evaluation of searches made with purported consent and without a warrant, by several of the United States Courts of Appeal. A summary of the rules is found in *Judd* v. *United States,* 190 F.2d 649, 650-651 (D.C. Cir. 1951):

> Searches and seizures made without a proper warrant are generally to be regarded as unreasonable and violative of the Fourth Amendment. True, the obtaining of a warrant may on occasion be waived by the individual; he may give his consent to the search and

> seizure. But such a waiver or consent must be proved by clear and positive testimony, and it must be established that there was no duress or coercion, actual or implied. . . . The Government must show a consent that is "unequivocal and specific" . . . "freely and intelligently given." . . . Thus, "invitations to enter one's house, extended to armed officers of the law who demand entrance, are usually to be considered as invitations secured by force." . . . A like view has been taken where an officer displays his badge and declares that he has come to make a search . . . even where the householder replies "All right." . . . Intimidation and duress are almost necessarily implicit in such situations; if the Government alleges their absence, it has the burden of convincing the court that they are in fact absent.

Consistent with *Ker* v. *California, supra,* federal courts deciding habeas corpus cases brought by state prisoners, hold that in a state criminal prosecution, the burden is upon the state to prove understanding and intentional waiver of Fourth Amendment rights by clear and convincing evidence that consent was voluntarily and specifically given and was not the result of actual or implied coercion. *Hubbard* v. *Tinsley,* 336 F.2d 854 (10th Cir. 1964); *United States* v. *Reincke,* 229 F.Supp. 132 (D.C. Conn. 1964); *Nelson* v. *Hancock,* 239 F.Supp. 857 (D.C. N.H. 1965).

In the present case the search was made on the strength of the warrant, not on any voluntary and freely given consent to the search by the petitioner's grandmother, Mrs. Leath. If the state chose to rely on the warrant at the time the search was made, the state also should have relied on the warrant at the time of trial. A law-abiding citizen

is expected to yield to the search of his premises when confronted with a paper represented by the police to be a search warrant. If the occupant of the premises searched knew that the paper was not in fact a search warrant at all, or was such a defective one that the prosecuting attorney would later be unwilling to subject it to the scrutiny of the court, it strains one's credulity to think that the search would have been so willingly permitted. Surely as a bare minimum it was incumbent upon the state in the present case to show, if it could be shown, that Mrs. Leath would have admitted the officers as readily had they come without what they called a search warrant.

Even putting aside this conduct of the officers, which borders on fraud, the fundamental Fourth Amendment criteria elaborated by *Amos* v. *United States,* 255 U.S. 313 (1921), and *Johnson* v. *United States,* 333 U.S. 10 (1948), would make it almost impossible to find that there was voluntary consent to the search, in view of the circumstances of the age, sex, and race of Mrs. Leath, the physical isolation of her house, the absence of other friendly adults, the number of officers and the suddenness of their intrusion. The state's only evidence on the question of voluntariness of the consent was the testimony of Mrs. Leath; none of the officers were offered to contradict this testimony. Her equivocal and not completely intelligible recollections of her state of mind during the search, given in a tense courtroom in response to the prosecuting attorney's pressing cross-examination, certainly are not clear and convincing evidence of voluntary consent to a warrantless search.

The decision of the Supreme Court of North Carolina that Mrs. Leath's consent to the search was free and vol-

untary is not supported by the evidence.[44] Moreover, the Supreme Court of North Carolina was influenced in its decision to some extent by the simplistic and dangerous notion that so long as inculpating evidence was found, the means of a search are justified by its end:

> Is it unreasonable and unwarranted that the officers, charged with the duty of apprehending the heartless and inhuman perpetrator should use every energy in locating the weapon used and apprehending its user? . . . Their search might reveal nothing, and to some extent absolve the suspect. The fact that it did reveal the presence of the guilty weapon, to which the already-identified assailant had access, justifies the search. (App. 91)

This reasoning, so obviously at odds with the intendment of the Fourth Amendment, has been rejected by the Supreme Court on many occasions.[45]

B. The State Failed to Secure an Intelligent Waiver of the Right to Be Free From Warrantless Searches.

For a consensual search to be effective, there must be "an understanding and intentional waiver" of the constitutional right of protection against unreasonable searches. *Johnson* v. *United States,* 333 U.S. 10, 13 (1948). The Supreme Court has determined the requisites of an effective

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[44] Of course, the question of voluntariness is a combined question of fact and law, and on certiorari the decision of the Supreme Court of North Carolina on the question is not binding, because this is the very issue that must be reviewed and considered anew in the Supreme Court of the United States. *Watts* v. *Indiana,* 338 U.S. 49 (1949).

[45] *E.g., Lustig* v. *United States,* 338 U.S. 74 (1949).

waiver in connection with the Fourteenth and Sixth Amendment right to assistance of counsel, and the Fourteenth and Fifth Amendment privilege against self-incrimination. According to *Carnley* v. *Cochran,* 369 U.S. 506, 516 (1962), an effective waiver of the assistance of counsel requires proof that the "accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." According to *Miranda* v. *Arizona,* 384 U.S. 436, 444 (1966), waiver of the privilege against self-incrimination, with respect to statements stemming from custodial interrogation of the defendant, requires proof of a preliminary warning that the defendant has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney, either retained or appointed.

Fairness and reason require the application of these well-developed principles to waiver of Fourth Amendment rights. A United States District Court, in a persuasive opinion, has so held. *United States* v. *Blalock,* 255 F.Supp. 268 (D.C. Pa. 1966). This case holds that where the government, offering evidence obtained by search and seizure, contends the occupant of the premises waived his Fourth Amendment rights by giving a voluntary consent to search, the duty is imposed upon the officers who conducted the search to have warned the individual of his right to counsel, his right to remain silent, and his right to refuse a warrantless search.[46]

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[46] "The Fourth Amendment requires no less knowing a waiver than do the Fifth and Sixth. The requirement of knowledge in each serves the same purpose, i.e., to prevent the possibility that the ignorant may surrender their rights more readily than the shrewd. . . . To require law enforcement officers to advise the subjects of investigation of their right to insist upon a search warrant would

The Supreme Court has attended the need of the states for basic guidelines to pass upon the validity of search warrants. See *Aguilar* v. *Texas*, 378 U.S. 108 (1964). But with the growing practice of using warrantless searches by consent in substitute for searches with warrants, the law of *Mapp* v. *Ohio* is in danger of being outflanked. Too many lower court decisions, like the one rendered in the present case, choose to operate beyond the limits of the principles laid down in *Amos* v. *United States* and *Johnson* v. *United States*.[47] It is submitted that the Supreme Court, at the very least, should make applicable to the states the principle of these cases, that mere submission to a search demanded under government authority cannot be deemed an effective waiver of Fourth Amendment rights. Although the spirit of this principle is understandable, application of it to specific cases will be difficult, and there would inevitably continue a certain amount of the confusion and irregularity presently found in the lower court cases dealing with searches by consent. There would be something of an analogy to the long and uncertain development of the Fourteenth Amendment law on involuntary confessions, from *Brown* v. *Mississippi*, 297 U.S. 278 (1936), to cases like *Culombe* v. *Connecticut*, 367 U.S. 568 (1961), to *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), and finally to *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The lessons learned from the voluntary confession cases lend weighty support to

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impose no great burden, nor would it unduly or unnecessarily impede criminal investigation." *United States* v. *Blalock*, 255 F. Supp. 268, 269-270 (D.C. Pa. 1966). Accord, *United States* v. *Nikrasch*, 367 F.2d 740 (7th Cir. 1966). See the discussion of this question in Note, *Consent Searches: A Reappraisal After Miranda v. Arizona*, 67 Colum. L. Rev. 130 (1967).

[47] See the materials collected in Note 43, *supra*.

the argument for the adoption of a true rule of waiver, requiring the police to give to the person whose premises are to be searched a warning in advance of the right to refuse a warrantless search.

C. The Petitioner Has Standing to Complain of the Search of His Premises.

There can be no serious question of the petitioner's standing to challenge the search in question. He was not present at the time the premises were searched, since he was being held in jail. But as a member of the household and a common user and possessor of articles contained in the house, clearly he was within the scope of the Fourth Amendment protection. Standing to raise the question of an unconstitutional search is accorded by *Jones* v. *United States,* 362 U.S. 257 (1960), to any one legitimately connected with the premises where the search occurs.[48]

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[48] See *Elmore* v. *Commonwealth,* 282 Ky. 443, 138 S.W. 2d 956 (1940), a case with many factual similarities to the present one in which the court specifically decided the right to be secure against unreasonable searches and seizures is a personal right and is broad enough to cover the defendant as a member of the family, residing with his father and mother, since it was his dwelling as well as theirs. A posse of officers and citizens visited the home of the 17-year old Negro defendant hours after he was arrested and requested the defendant's mother, in the absence of her husband who was the head of the household, to give them the right to search the home for evidence against her son. The officer's testimony that the defendant's mother willingly gave them permission to search the home was not disputed at the trial. The court found the request to search made to the defendant's mother was to her the equivalent of a demand, a demand from those known to her as "the law." "In her eyes 'the law' was supreme and something not to be resisted or opposed—her apparent acquiescence in the search was most probably a mere outward manifestation of her recognition of the supremacy of the law . . . . " 138 S.W. 2d 956, 961.

Conclusion

The petitioner respectfully prays that the judgment of the Supreme Court of North Carolina in this case be reversed and remanded, for the reasons that (1) the petitioner was denied due process of law and equal protection of the laws, contrary to the Fourteenth Amendment, and was deprived of a trial by an impartial jury, contrary to the Sixth and Fourteenth Amendments, by the allowance of the State's challenges of prospective jurors for cause on the ground of conscientious scruples against the death penalty; and (2) the petitioner was denied due process of law in violation of the Fourteenth Amendment and was deprived of the right to be secure against unreasonable searches and seizures, in violation of the Fourth Amendment, by the seizure and use as evidence of a rifle taken from the petitioner's home without a search warrant and without the effective consent of the person in charge of the premises.

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